IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 786 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

CHATUR ALIAS RAMLO GABHRUBHAI DABHI

Versus

COMMISSIONER OF POLICE

Appearance:

1. Special Civil Application No. 786 of 2004

MS DR KACHHAVAH for Petitioner No. 1

MR KAMLESH KACHHAVAH for Petitioner No. 1

Ms Mita Panchal, AGP for respondents

CORAM : HON'BLE MR.JUSTICE D.P.BUCH

Date of decision: 31/03/2004

ORAL JUDGEMENT

The petitioner abovenamed has preferred this petition under Article 226 of the Constitution of India for appropriate writ, order or direction for quashing and setting aside an order of detention of the petitioner dated 21.9.2003 recorded by respondent no.1 herein in exercise of powers under section 3(2) of the Gujarat Prevention of Anti-social Activities Act, 1985.

2. The case against the petitioner was that he was involved in 6 IPC offences punishable under section 454, 457, 380 read with section 114 of IPC on the ground that he had committed theft in respect of certain Gold items stated at Annexure 'B' at pages 16 and 17 to the petition. It was also alleged against him that two unnamed witnesses have given statements against the detenu. On the strength of the above material, second respondent found that the petitioner was a dangerous person and, therefore, the order of detention was passed as aforesaid against him. The petitioner contends that the impugned order is illegal. It has also been contended that the petitioner was in judicial custody at the relevant point of time and, therefore, the order of detention was not required. The petitioner has, therefore, prayed that the present petition be allowed and the order of detention may be quashed and set aside.

3. On receipt of the petition, rule was issued. Ms. Mita Panchal, learned AGP appeared for the respondents. I have heard the learned Advocates for the parties and have perused the papers.

4. On going through the detention order dated 21.9.2003 placed at page no.16, it is found that six offences have been registered against the petitioner during the aforesaid period.

5. So far as the offence of theft and criminal trespass are concerned, it has to be observed that these are the offences relating to the moveable and immoveable property of individual person. In other words, these are offences against the individuals and it may amount to problem of law and order. However, it is difficult to accept that by committing the aforesaid offences, the petitioner had violated public order. Then we can refer to the statement of witnesses which have been referred in para 2 of the order of detention. Reference is made to two unnamed witnesses who had given statements to the police officer to the effect that the petitioner was guilty of violation of public order.

6. On the strength of the aforesaid statement,

learned AGP has submitted that these are the acts of the petitioner amounting to threat to the public order and they are not the incidents with respect to the threat to the law and order only. On the other hand, learned Advocate for the petitioner has relied upon a decision of this court dated 5.2.2004 rendered in Special Civil Application No.17536/2003. There also the matter related to registration of certain offences committed by the detenu. Moreover, there were some statements of unnamed witnesses. There it has been observed that the facts were directed against the individuals and simply on the ground that the petitioner and associates were alleged to have rushed towards the people who had gathered over there with gupti and knife, would not be an act which would affect public order and would be prejudicial to the maintenance of public order and such acts cannot have any adverse effect disturbing even the tempo of life or peace and tranquility of the locality as that would be casual and isolated incidents. While dealing with the said aspects, the learned Judge had an occasion to deal with the cases of Smt. Tarannum v. Union of India, reported in 1998 Cr.LJ 1414. The learned Judge also referred a case of Mustakmiya Jabbarmiya Shaikh v. M M Mehta, Commissioner of Police, reported in XXXVI (2) GLR 1268. Even the case of Amanulla Khan Kudeatalla Khan Pathan v. State of Gujarat, reported in AIR 1999 SC 2197 was also referred in para 8 of the said judgment. On consideration of the aforesaid judgments, this Court has observed that these are stray individual incidents affecting law and order but it cannot be said that these incidents would affect the public order.

7. Learned Advocate for the petitioner has also relied upon a decision a decision of this Court in the case of Ashokbhai Jivraj v. Police Commissioner, Surat, reported in 2000(1) GLR 816 wherein the Division Bench of this Court was required to deal with the situation arising from law and order. Four cases were registered against the detenu under the IPC. This Court observed that looking to the incidents, the case would fall under the maintenance of "law and order" and not "public order". The Division Bench of this Court made a further observation that subjective satisfaction arrived at by the detaining authority cannot be said to be legal or valid. In para 21 of the said decision, the Division Bench of this Court has made the following observation:

> "21. So far as the cases against the detenu are concerned, they have already been registered. They were against persons mentioned therein which is stated in the grounds of detention by the

> detaining authority. Regarding two statements, having taken into account the law laid down by the Supreme Court in Ram Manohar Lohia v. State of Bihar, AIR 1966 SC 740 and reiterated from time to time including the decisions referred to by us hereinabove, the case falls under the maintenance of "Law and Order" and not "Public Order". The subjective satisfaction arrived at by the detaining authority, therefore, cannot be said to be legal, valid and in accordance with law. Since in the facts and circumstances, an order of detention could have been passed by the detaining authority for maintenance of "Public Order", the order deserves to be quashed and is hereby set aside. The detenu is ordered to be set at liberty forthwith unless required in any other case. Appeal is accordingly allowed. No order as to costs. Before parting with the matter, we may observe that recently, we have come across few cases wherein no counter-affidavits are filed by the respondents. It is settled law that whenever an order of detention is challenged by a detenu or by his "next friend", it is the duty of the authorities to justify the action by filing counter-affidavit preferably by the detaining authority himself, unless there are circumstances which may justify filing of affidavit by an officer or authority other than the detaining authority (Vide Halsbury's Laws of England, 4th Edition, vol.II, paras 1492-95, pp. 791-33; Mohd. Subrati v. State of W.B., AIR 1973 S 2684, Khudram v. State of W.B., AIR 1975 SC 550; Ranjit Singh v. State of Pepsu, AIR 1959 SC 843, Dulal v. State of W.B. AIR 1974 SC 2561; Abdul Gaffar v. State of W.B., AIR 1975 SC 1496, Krishna Murari v. Union of India, AIR 1975 SC 1877, Shaikh Hanif v. State of W.B. AIR 1974 SC 679; Vijay Narain v. State of Bihar, AIR 1984 SC 1334; Suraj Pal v. State of Maharashtra, AIR 1986 SC 2177."

8. Learned Advocate for the petitioner has also referred to a decision of this Court dated 22.7.2002 in Special Civil Application No.5745/2002. In that matter, the learned Judge relied upon the decision in the case of Ashokbhai Jivraj v. Police Commissioner, Surat (Supra) and found that the case before him was on par with the case mentioned in the aforesaid decision and, therefore, on following the principles laid down in Ashokbhai Jivraj (supra), the learned Judge found that there was no scope for the detaining authority to exercise powers vested

with him under section 3 of the said Act.

9. In above view of the matter that it is found that in the present case also six cases under IPC have been registered against the petitioner, nevertheless, it is also the fact that these are the offences which can be treated to be individual offences against the properties of the individuals involved in those cases. Such offences or such acts on the part of the petitioners could not be treated to be a threat to the "public order" and, therefore, the detaining authority would not be justified in passing an order of detention on such grounds, which may amount to a threat to "law and order".

10. As regards two other statements of unnamed persons, again it is a matter of stray incidents at different places with respect to different persons. Looking to the time lag between the two and looking to the time lag between the dates of the occurrences of those incidents and the dates on which their statements came to be recorded by the police officers and the dates on which those statements were verified by the detaining authority, I am of the opinion that it cannot be said that again these statements would give a cause of action to the detaining authority for passing an order of detention against the petitioner. It is extremely clear that before passing an order of detention of a detenu, the detaining authority must come to a definite finding that there is a threat to the "public order". The difference between "public Order and "law order" has been demonstrated in the earlier decisions and considering those decisions, it is very clear that the present case would not fall within the category of threat to a public order and the order of detention cannot be sustained in the eye of law. In other words, the detaining authority had no reason to pass an order for detaining the detenu in exercise of powers conferred by section 3(2) of the said Act. In that view of the matter, when the order of detention has been passed by the detaining authority without having grounds for passing the said order, it cannot be sustained and, therefore, it deserves to be quashed and set aside.

11. For the foregoing reasons this petition is allowed. The impugned order dated 21.9.2003 passed by respondent No.1 in exercise of powers under section 3(2) of the PASA Act detaining the present petitioner, is ordered to be set aside. The detenu is ordered to be set at liberty forwith, if no longer required in any other case. Rule is made absolute to the aforesaid extent. No

order as to costs. D.S. permitted.

[D P Buch, J.]

msp